In the Supreme Court

Of the United States.

OCTOBER TERM, A. D. 1888.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,
vs.
PETER CAMPBELL, W. G. SEDAM, CHARLES S. THOMAS, BETTIE WHEELER AND MARTHA E. ALLEN,
Defendants in Error.
No. 222.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

L. S. DIXON,
For Plaintiff in Error.

WHIPPLE & PIERSON, LEGAL PRINTERS, DENVER, COLO.

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STATEMENT.

This was an action of ejectment brought by the defendants in error here, the plaintiffs below, to recover possession of certain mining property, particularly described in the complaint, situated in California Mining District, in the county of Lake, and state of Colorado.

The plaintiffs below asserted title under a patent of the United States, issued to their grantors on the 15th day of March, 1883. The defendant below, plaintiff in error here, asserted title to the same premises under a patent of the United States, issued to their grantor on the 13th day of January, 1880. The patent under which the plaintiffs below claimed, was of a lode mining claim

known as the Sierra Nevada lode. That under which defendant claimed, was of a placer mining claim, known as the William Moyer placer mining claim, William Moyer patentee. The placer claim was located by William Moyer on the 3d of July, 1878, his certificate of location made and dated July 10, 1878, and filed and recorded in the office of the county clerk and recorder on the 15th of July, 1878. The lode claim, as appeared by an "amended" certificate of location, was located on the 10th of March, 1879. The original certificate of location of the lode claim, if one was ever made, which was not shown, was never recorded in the office of the county clerk and recorder. The only location certificate there recorded was that called an "amended" location certificate, bearing date September 8, 1879, and recorded September 10, 1879.

The mining laws of Colorado (General Laws, 1877, p. 629) required the locator of a lode claim to record his location certificate within three months from the date of discovery which, under the law of congress forbidding a location until discovery, made it incumbent upon the locator to record his certificate within three months from the date of location, March 10th, named in it. (The foregoing statements with regard to the dates of the location of the respective claims, and the making and recording of the certificates, are of the facts as they would have appeared had the court not excluded the documentary evidence thereof, offered by the defendant below, as shown by the amendment to the bill of exceptions, which amendment should be read as a continuation of page 43 of the printed record). The survey and application for entry of the placer claim was filed in the land office on the 13th of November, 1878, and the entry was made and claim paid for, as recited in the patent, February 21, 1879. The patent for the lode claim recites that it was entered and paid for on the 13th of December, 1880.

It appeared on the face of the patent of the lode claim that nearly the whole of that claim, all save a small triangular piece in the southwest corner, was located within the boundaries of the placer, which had been already patented to Moyer under the designation of lot No. 300. This will be most readily seen and understood by examining the plat or diagram inserted in and constituting a part of the patent, a copy of which is found at page 12 of the record.

The patent of the placer claim contained the reservation usually found in such patents: "That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents;" which reservation should be read as if words, *claimed or*, were stricken out, and as if in place of the words, *at the date hereof*, there had been inserted the words, *at the date of the application for this patent* 124 U. S., 382.

The patent of the lode claim was most peculiar—differing in several particulars from instruments of the kind usually issued by the land department. In the first place, it purported to convey by title in fee simple a strip of land fifty feet in width by fifteen hundred feet in length, running through the center of the lode claim from end to end, which strip of land had already been patented to Moyer, as appeared on the face of the lode patent. In the next place, lode claims being, by district rules, three hundred feet in width by fifteen hundred in length, it purported to convey in fee, on each side of the fifty-foot strip, one hundred and twenty-five feet more of the patented placer claim below the surface, leaving the placer patentee the owner of the surface ground only. The line of division between the placer patentee, as the owner of "the surface ground," and the lode patentee, as the owner of the soil or earth beneath the surface, was not indicated or attempted to be defined in the patent. The depth to which the surface title or ownership extended was left wholly vague and indeterminate.

The premises in controversy, on the trial below, were that part of the lode claim lying within the boundaries of the placer. The plaintiffs, in the complaint, asserting title under the lode patent, claimed "to be the owners and possessed thereunder of all the area included within the said Sierra Nevada boundaries, three hundred feet in width by fifteen hundred feet in length, save and except only *that part and portion of the surface thereof as is expressly excluded by the terms of said patent;*" and they demanded and obtained judgment therefor against the defendant according to such description.

The reason for this most extraordinary and unauthorized attempt on the part of the land office to patent lands no longer a part of the public domain by horizontal planes or lines of subdi-

vision to be drawn at random beneath the surface of the earth will be apparent when the circumstances of the case and the purpose and object of the lode claimants and patentees are made known. The theory upon which they proceeded, and upon which the land department acted, was that the lode was one known by Moyer to exist at the time he applied for patent of the placer, and which, not having been included in his application, no title to it passed by the patent according to the provisions of Section 2333 of the Revised Statutes and the reservation contained in the patent. But it was a fact very well known that the lode or vein was not one having a top or apex within the boundaries of the placer, or within a long distance, if at all, outside of these boundaries. The lode patentees understood it to be part of the so-called blanket deposit found in the Leadville district, the nature of which has been the subject of so much controversy, both in the courts and out of them, and which, with the ever varying fortunes of the law, has been sometimes judicially found to be a lode or vein, with top or apex outcropping on the western slope of Iron Hill, (the Moyer placer being situated upon the eastern slope and in the valley beyond), but more frequently decided to be only an extensive mineral deposit having no top or apex. Acting upon the latter supposition and belief, the lode claimants marked out their claim and made their location within the boundaries of the placer as shown by the diagram, and thereupon succeeded in obtaining a patent of the fifty-foot strip as being "twenty-five feet of surface on each side" of a known vein or lode reserved from the placer patent and having its top or apex in the center of such strip. Such was the ground upon which right and title in fee to the fifty-foot strip was claimed, the same being an imaginary appurtenant to an imaginary lode having its top or apex therein. But it being known that there was no lode with top or apex within the fifty-foot strip or elsewhere within the exterior lines of the lode claim, and the object of the claimants being to obtain title to a segment or portion of the flat deposit (believed to exist some hundreds of feet beneath the surface) corresponding with the surface boundaries of the lode claim and equalling it in area or extent, it became necessary for the lode claimants to assert title or right *somewhere*, they knew not where, to the soil or earth beneath the two one hundred and twenty-five feet parcels lying on each side of the fifty-foot strip, and so such right or title was asserted by the lode claimants and sanctioned by the land office as shown by

the patent. The lode patentees were given an indefinite and ambulatory title in fee, to be asserted whenever and wherever it served their interest or convenience, beneath the surface. An examination of the testimony given by the plaintiffs below and contained in the record will show that there was no pretense of any top or apex of any lode within the surface boundaries of the lode claim, and that such was the theory upon which the lode claimants proceeded and the officers of the land department acted in issuing the patent.

The trial below was by the court without a jury, a stipulation in writing waiving a jury having been filed with the clerk, as shown by the statement in the bill of exceptions (p. 8), and the finding (p. 44). 12 Wall., 275. Such having been the mode of trial we are limited in this court to a discussion of the objections to the admission and exclusion of evidence saved by the bill of exceptions; and, the finding of facts having been special, the question whether the facts found sustained the conclusions of law is also presented.

The patent of the lode claim was received in evidence, under objection and exception (fol. 27) on the part of the plaintiff in error.

The testimony of the witnesses for the plaintiff, six in number (pp. 15 to 40), was all received against objections and exceptions too numerous to be separately noticed, but all, or nearly all, going to the main point of irrelevancy, immateriality and incompetency to show that a vein or lode was known to exist within the boundaries of the placer at the time application was made to patent it.

The location certificates of the placer and of the lode claim, offered in evidence by the plaintiff in error, the general nature and contents of which are shown by the amendment to the bill of exceptions, were excluded, to which exception was taken, as shown at the beginning of page 44.

The findings of the court and its conclusions of law (pp. 44–5) were as follows:

"This cause coming on for trial before the court, and the parties appearing by their attorneys and having, in open court and by their stipulation in writing filed with the clerk, waived a trial by jury, and the court, having duly heard and considerd the evidence, oral and documentary, offered by the respective parties,

and having duly deliberated thereon, finds the following facts and conclusions of law, viz.:

"That the defendant, The Iron Silver Mining Company, is a corporation created and organized and existing under and by virtue of the laws of the State of New York, and has complied with the laws of the State of Colorado, so as to entitle it to do business and sue and be sued in the State of Colorado.

"That the mining ground and property described in the pleadings in this action were a part of the public domain of the United States until the title passed out of the United States by the issuing of patents, as hereinafter set forth.

"That the said patent of the Sierra Nevada lode mining claim was issued to the said plaintiffs and their grantors and predecessors in interest at the time thereto (therein) stated, and by duly executed and recorded deeds of conveyance the title to the land mentioned and described in the said patent and the complaint in this action has been conveyed to and is seized, owned and possessed by the said plaintiffs, and was seized, owned and possessed by them at the time of the commencement of this action.

"That on the 13th day of November, 1878, the said William Moyer duly made application in the proper United States land office to be allowed to enter and pay for a patent for said William Moyer placer mining claim, being survey lot No. 300 and mineral entry No. ——; that on the 21st day of February, 1879, said William Moyer was allowed to and did make entry in said land office of the United States, and paid for said placer claim, and that on the 30th day of January, 1880, the said William Moyer placer patent was issued to the said William Moyer for the tract of land described in said placer patent, and that, by virtue of duly executed and recorded deeds of conveyance, the said defendant company has become the owner of and seized of all the right, title and interest in and to the said tract of land described in and conveyed by the said placer patent.

"That the ground described in said patent of plaintiffs for said Sierra Nevada lode claim is principally located or situated within the exterior boundaries of the tract of land described in said placer patent for the said William Moyer placer claim, and is part of the same land, and the maps introduced in evidence, and contained in the bill of exceptions and record, correctly delineate the surface of the ground comprised within the boundaries of the said placer patent and the said lode patent, respectively.

Conclusions of Law.

"And the court finds, as conclusions of law from the foregoing findings of fact, that it is conclusively presumed and found from the face of the said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located and recorded and owned by the patentees in the Sierra Nevada lode patent and their predecessors in interest (the said plaintiffs), within the exterior boundaries of the said tract of land described in the said William Moyer placer patent, and the mining ground described in the said complaint, and conveyed by the said lode patent, is excepted out of the grant of the land described in and conveyed by said placer patent.

"And the court finds that the plaintiffs were, at the time of the commencement of this action, and still are, the owners and seized of the said tract of land described in said complaint, and called the Sierra Nevada lode mining claim; that the said defendant company wrongfully withheld, and still does wrongfully withhold, the possession thereof from the plaintiffs.

"It is therefore ordered and adjudged that the plaintiffs have judgment against said defendant company for the possession of the mining ground in dispute, as described in the complaint herein, with costs to be taxed."

ERRORS ASSIGNED.

1. *The court erred in receiving the Sierra Nevada patent in evidence.*

2. *It erred in receiving the parol evidence offered for the purpose of showing that the lode in question was known to the patentee of the placer at the time of his application for patent.*

3. *It erred in excluding the location certificates of both the placer and lode claims.*

4. *It erred in its conclusions of law upon the facts found.*

POINTS AND ARGUMENT.

I.

The nondescript patent of the lode claim was void on its face, there being no authority vested in the land department to patent lands in that way. The department possessed no power to patent

surface ground to one man, and the ground or soil beneath the surface to another. No such division and patenting of the public lands by horizontal lines or planes drawn beneath the surface, giving the surface ground to one patentee, and the ground beneath to another, is authorized or contemplated by any law of congress. And if any such division had been authorized or contemplated, the patent in question was void for uncertainty as to the line or plane of division between the surface and underground patentees. If the land department had been authorized to carve out of the estate previously patented to Moyer, any portion of the soil or ground beneath the surface, and patent it to another, it was bound to do so by a clear and definite description, so that the subsequent patentee would know where his right and title began, and Moyer where his right and title ended, and, until that was done, Moyer would remain seized of the whole, according to the terms of his prior patent.

But more than this, it appearing on the face of the lode patent that the entire premises in dispute had been previously patented to Moyer, it was manifest that the land office was without authority again to patent any part of the *land* so previously conveyed, and that the patent was void as to the fifty-foot strip as well as to the one hundred and twenty-five feet parcels on each side of it. So far as the *land* was concerned and the soil and rocks composing the same, both upon and beneath the surface, as distinguished from a vein or lode of quartz or other rock in place, bearing gold, silver, etc., the title to all the land had passed by the prior patent. The fifty-foot strip was land, placer land, the title to which had already gone to Moyer from and including the surface down to the point where the alleged lode or vein was reached some three hundred and twenty-five feet (fol. 31) below the surface, which land it was obvious could not be patented a second time to the lode claimants.

Again assuming that there was a known lode, or that this so-called Sierra Nevada lode was known by the placer patentee to exist within the placer and had been so situated that he could have included the same in his application to enter the placer "upon the payment of five dollars per acre for such lode and twenty-five feet of surface on each side thereof," according to the provisions of Section 2333, (a thing which, in the actual situation of the lode in question, was utterly impossible), and assuming that he failed so to include it and therefore that it was excluded

from the operation of the patent, still we insist that the land officers were without authority to issue a patent for such lode. Section 2333 excepts from the patent only the vein or lode known to the placer patentee to exist, and which he does not include in his application. Such is the construction of the statute by repeated decisions of this court, including *Noyes vs. Mantle*, 127 U. S., 348, 352, 353. "Where a vein or lode, such as is described in a previous section, is known to exist at the time within the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the *vein* or *lode*." And in the case last cited it was held that the section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States for the reason that such "a mining claim perfected under the law is property in the highest sense of that term," and is not, therefore, subject to the disposal of the government. "The section," say the court, "can apply *only* to veins or lodes not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them."

It is, therefore, only the known lode or vein itself which is excepted from the grant. Such is the construction and effect of the statute, and such the express language of the patent. And the exception, which cannot be extended to anything beyond the thing excepted, cannot be held to include any part of the land, or the adjacent or surrounding rocks and soil, the title to which passes to the placer patentee. The exception of the vein being equivalent to a conveyance of it by the grantee back to the grantor, would have carried with it to the owner of the vein, whoever he might be, the right of ingress and egress for the purpose of extracting and removing the ores, together with the right to break and disturb the adjacent rocks and soil, so far as might be necessary in the reasonable working and development of the lode and removal of the ores, but doing no damage to the inheritance beyond what might thus arise. Assuming the lode to have been excepted from the placer patent and to have been subsequently patented by the land department the utmost effect of such patent would have been to convey the lode itself, which conveyance

would have carried with it incidental rights of the kind above stated.

But the lode in question, if such be its character, was not one of the kind expressly excepted, or intended to be by Section 2333, and not one for which a patent could be subsequently issued as for such excepted lode. Section 2333 clearly contemplates a lode outcropping within the surface boundaries of the placer, or having its top or apex therein shown and known by development, so that the surface ground on each side may be measured off and paid for at the statutory rate per acre. Such is the excepted lode contemplated and provided for, and it seems impossible to apply the statute to any other. Whether it be the lode only, or the lode and twenty-five feet of ground on each side, which congress intended to except, the exception must be ascertained by *surface* measurement. If only the lode is excepted, the extent of the exception must be ascertained by measuring its width at its outcrop, or apex as shown by development, and if to that surface ground is to be added, it must be measured off on each side of such outcrop or apex. If there be no known lode of this description within the boundaries of the placer, then there is nothing upon which the statutory exception can operate; and any attempt of the land department to patent a lode of any other kind as within the exception, must be futile and void. The exception is in entire harmony with the provisions of law regulating all lode claims by which they must be located and patented by top or apex found within their surface lines.

Again, if only the lode was excepted the same by express provisions of law was not open to exploration and purchase, because not a valuable mineral deposit in lands belonging to the United States. Sections 2318 and 2319.

It appeared on the face of the lode patent that "all that portion of the surface ground hereinbefore described which is embraced by said lot, No. 300," had been previously "patented to William Moyer with his placer mine." With such facts recited in and plainly shown by the lode patent on its face, it was error to receive or to act upon it as any evidence of title in the plaintiffs.

II.

The parol testimony offered by the plaintiffs for the purpose of showing that a lode was known to exist within the boundaries of the placer at the time Mr. Moyer made his application for entry

and patent, was inadmissible. The testimony had no tendency to establish such fact. It was all testimony as to after made discoveries and after acquired knowledge of the so-called lode, and then not within, but wholly without the boundaries of the placer. No knowledge of the existence of any lode was brought home, or attempted to be, to Mr. Moyer, and conversations between third persons with whom he was not shown to have had any connection, were received. But inasmuch as the court below did not act upon the parol evidence, it may be said that its inadmissibility is not now a matter of importance, and we leave it for such consideration as the court may see fit to give.

III.

The respective location certificates of the placer and the lode claims with their dates of record should have been received. The court below being unable to find from the parol evidence that any lode was known to exist within the boundaries of the placer at the time of the application to patent it, recourse was had to a doctrine of presumption, called by the court *conclusive*, by which the junior patent was held to be paramount and superior to the senior patent of the same ground. This doctrine, carried out and enforced as it was in the conclusions of law, would render every second patent of land paramount and superior to a first one, and every third patent to a first and second one, and so on. Titles to lands once belonging to the government would become like titles to lands sold for the non-payment of taxes, where the deed upon the last tax sale prevails, and there would be no end of the number of patents which might be issued for the same land. In favor of every last patent it would be conclusively presumed that there existed a state of facts which authorized its issue, and the first patentee and his assigns would be without remedy, judicial, or otherwise, to assert or maintain his title, however regular and valid the same may have been in its inception and acquirement. Such appear to have been the views entertained by the court below in accordance with which the location certificates were rejected and the title under the second patent held paramount to that acquired under the first.

Under the numerous decisions of this court it seems quite unnecessary to dwell upon the proposition thus presented. There is no warrant or authority of law for the presumption thus set up

in favor of the junior patent. On the contrary, the presumption within all the decisions of this court is exactly the reverse. Nothing appearing, save the fact that a patent has been issued for land previously patented to another, the presumption and inevitable conclusion is, that such second patent is void. If an exception in the first patent is relied upon by the second patentee, the burden is upon him of proving every fact and circumstance establishing such exception, and that the title which he asserts is within it. And the question thus presented, whenever it arises, after the issuance of the two patents, in any controversy between the patentees and their assigns, becomes a judicial question to be settled and determined by the courts, and not one upon which the action of the land department in issuing the second patent is in any manner conclusive against those claiming title under the first patent. The second patent in such case, assuming there exists power to issue it, goes without notice to the first patentee or his assigns. There is no provision of law or rule of the land department requiring notice in fact to be given to a first patentee that a second patent has been applied for or is about to be issued for any part of the land embraced in the first patent. The proceedings in the land office, as was the case here, are purely *ex parte*. With no opportunity of being heard before the land office, and no jurisdiction there to determine the questions thus arising, it is obvious that the first patentee and his assigns must have their day and hearing in court whenever the same questions are afterwards involved, or otherwise that he and they may be deprived of valuable legal rights and property without privilege of assertion or defense, which is the abhorence of our law. And such was the effect of the rulings of the court below in excluding the location certificates offered in evidence, and in conclusively presuming that there existed another and different state of facts upon which the second patent of the same land was lawfully issued. It deprived the first patentee or his assignee, the defendant company, of the privilege of showing that the second patent was void, and that under any and all existing circumstances the title under the first patent was not effected by it. It denied the defendant company the right to prove the non-existence of the facts presumed, which facts were so far jurisdictional in their nature that without them there was no authority in the land department to issue a second patent embracing anything within the boundaries of the previously pat-

ented placer, whether surface ground, or rocks and soil, or veins or lodes, or other mineral deposits whatsoever beneath the surface. There being no proof, and no finding, of a known lode, and the supposed prior discovery, location and recording of the lode claim being disproved, the issuance of the lode patent for anything within the boundaries of the placer became an act of sheer usurpation on the part of the land department, and the lode patent was so far void. The ruling, therefore, was a denial of the right of the placer patentee and his assigns to show that the lode patent, so far as it purported to grant anything within the boundaries of the placer, was void for want of jurisdiction in the land department to make such grant. It made the land department a tribunal whose jurisdiction was unimpeachable, when, under like circumstance, upon matters of fact shown, the jurisdiction of the courts throughout the country might have been impeached. It has not hitherto been the habit of this court to look in this way upon the jurisdiction of the land department in the issuing of patents. Inquiry into such jurisdiction, where the rights of third persons were concerned, has always been held to be free and open, and the exclusion of such inquiry by the court below was obvious error.

IV.

Our fourth and last point of error is substantially the same as that just discussed. There can be no such conclusive presumption in matters of jurisdiction where the vested rights of third persons are involved as that found in the first conclusion of law, and from which the error in the second conclusion necessarily followed. The presumption, if any was to be indulged in favor of a second patent as against a first one of the same land, would merely be that it was *prima facie* valid, not that it was conclusively so. It was one of the facts found that the land in controversy was embraced in the previous patent to William Moyer, whose title, by duly executed and recorded deeds of conveyance, had passed to and was held by the defendant company. Under such circumstances we submit there could be no presumption in favor of the second patent as against the first, but that it was incumbent on the second patentees, or those claiming under them, to show that the land granted to them was excepted from, and not conveyed by, the first patent, or otherwise that the first patent was void for want of jurisdiction to issue it for such land, the

same not having been open and patentable as part of the public lands of the United States. The presumption in favor of the validity of the second patent was countervailed by an equally strong presumption in favor of the validity of the first, and there could be no *prima facie* effect given to the latter as against the former. To presume that the second patent was *prima facie* valid was to presume that the first one was *prima facie* void, a presumption not to be indulged under such circumstances. Balancing the one against the other, and conceding that no additional weight was to be given to the first patent because it was the first, the two patents neutralized each other in this particular and there was no ground left for presumption. Instead, however, of taking this view, the court below solved the question, without proof of a single fact, by presuming that the first patent was void for want of jurisdiction to issue it. It brought into the case, by a kind of presumption *denominated legal*, a state of facts which, had they existed, might have avoided the first patent according to the doctrine of *Mantle* v. *Noyes*. This was, without proof of any fact whatever affecting its validity, declaring the first patent *pro tanto* void.

The so-called first conclusion of law in this case is like that presented in *French* v. *Edwards*, 21 Wall. 147. It is a mixed conclusion of both law and fact, and, so far as it may be regarded as a finding of the latter, it does not bind this court according to the rule laid down in that case.

For the errors thus assigned and for these reasons we ask that the judgment of the court below be reversed with such further directions as may be according to law.

L. S. DIXON,
For Plaintiff in Error.

December 11, 1888.